

Nguyen (Migration) [2018] AATA 1677 (20 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Thi Tinh Nguyen
CASE NUMBER:	1622159
DIBP REFERENCE(S):	CLF2013/117893 CLF2016/90415
MEMBER:	David Barker
DATE:	20 April 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations.

Statement made on 20 April 2018 at 3:14pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) visa – Whether a genuine spousal relationship exists between the parties – Limited evidence of joint finances – Joint household responsibilities – Limited evidence of social aspects of relationship – Whether the parties are committed to each other - Emotional support – Significant time spent cohabitating – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2, cl 820.221(c)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 December 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 5 December 2015 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 of Schedule 2 to the Regulations because the delegate was not satisfied that the applicant was the spouse or de facto partner, as defined in s.5F or s.5CB of the Act, of the sponsoring partner.
4. The applicant appeared before the Tribunal on 7 February 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant is a citizen of Vietnam and is currently 34 years old. She first came to Australia in 2006 on a student visa.
9. The sponsor was born in Vietnam and is currently 62 years old. He first arrived in Australia in 1994 and became an Australian citizen in 1999.
10. The parties claimed that their relationship began in March 2011. They were married in May 2013 and the applicant was granted a Subclass 820 Partner (Temporary) visa on in October 2014.
11. The decision record of the Departmental delegate who considered the application, a copy of which was provided with the review application, noted that information provided by the applicant during a telephone interview on 21 November 2016 raised concerns as to whether the parties were living together as a genuinely married couple. The delegate stated that the applicant demonstrated little knowledge of her sponsor's family, such as the names of her stepgrandchildren and her sponsor's siblings. The delegate noted that the sponsor stated she does not have contact with her sponsor's siblings, which contradicted her claim that her relationship with her sponsor was strongly supported by relatives from both sides of their families. The delegate noted that photographs provided with the visa application mostly only show the applicant and sponsor and did not provide any insight into the applicant's social activities with her sponsor, her family, her sponsor's family or with friends of the parties. The delegate also noted the applicant provided inconsistent information with regard to the

payment of living expenses and the documentary evidence provided with the visa application did not support the applicant's claims as to the sharing of the parties' living expenses. The delegate further noted that according to the evidence provided by the applicant during her phone interview her sponsor demonstrated little commitment to sharing living expenses. Further to this the delegate expressed concern in relation to inconsistent information provided regarding the commencement date of the parties' commitment to a shared life together and the date of their marriage.

12. Prior to and at the hearing the applicant's migration agent provided additional documents to the Tribunal including but not limited to the following:

- Written submissions from the migration agent;
- Photographs;
- Witness support statements;
- A statement from the applicant, dated 3 February 2017.
- Copies of wedding invitations;
- Correspondence to the applicant from the Commonwealth Bank (CBA), dated 11 September 2017;
- Account statements from a CBA account in the applicant and sponsor's names covering the April 2017 to October 2017 period;
- A receipt from Supreme Furniture, dated 4 January 2018;
- A receipt from Bing Lee, dated in or around August 2017;
- A copy of a letter to the sponsor from the Australian Bureau of Statistics.

13. The applicant's statement, dated 3 February 2017 states:

14. *I live, at the above address [supplied] with my husband [name supplied]*

In relation to issues raised by the Department I would reply as follows:

2.1. Social Aspects:

My husband's grandchildren

The delegate said that I did not know the full names of two grandchildren of my husband's. I only know their first names, Sang and Chloe. I only know about my husbands grandchildren aged about 3, 4 because: I never ask their full names in Birth Certificate. The grandchildren living with their parents far away in Melbourne. I never met them. I only hear about them from my husband.

2.2. My husband's siblings

The delegate said that my husbands siblings do not attend our weddings. My husband has four siblings, one of them passed away a long time ago. Two other sisters and one brother are living in Vietnam. They were unable to attend our wedding because to be granted a visitor visa from Vietnam to see us in Sydney is not simple. In addition, my husband is not close to his siblings. As regards my husband's parents, both parents have passed away. On my side, all my close relatives, parents and siblings support our marriage.

2.3. Financial Aspects:

The delegate said that I told him that I used cash to pay rent and living expenses. The remainder of the money, if any, I deposited in our joint account with CBA: But then I told the officer that the remainder of the above money would be used to pay our living expenses such as food and electricity, too. The officer then concluded that my statements were inconsistent. I do not see any inconsistency in my statements. Given the expensive living standard in Sydney, any savings could be used for living expenses is normal.

2.4. Nature of our commitment

Date of our Marriage

The delegate said that my husband stated in his Statement that our marriage was on 18 May 2015, and then further stated that our marriage was on May 2013. The delegate said that he was concerned about the inconsistent information about the date of our marriage. I would say that the

year 2015 was only a typing error because of the following reasons: First — in Form 47SP (Question 55) and Form 40SP (Page 2, Q 20) (Enclosed), We declared our date of marriage: 18 May 2013. In our Statutory Declarations (enclosed) we both declare our date of marriage 18 May 2013 (page 1, paragraph 1 of our statutory declarations dated 23 May 2013).

2.5. Health Condition

My husband has been suffering from heart condition. He underwent operation once. At present, he is taking medicine daily and sees his specialist once every six months. Therefore, he needs my emotional support. I believe that the delegate did not consider all relevant facts in my case. Therefore, I would ask the Tribunal to review the case.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether, at the time of decision, the applicant continues to be the spouse or de facto partner of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

16. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing and the couple must live together, or not live separately and apart, on a permanent basis: s.5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.
19. The parties provided the Department with a copy of their marriage certificate and the Tribunal has reviewed this document and has no concern as to its validity. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

20. The financial aspects of the relationship

21. *Are there any joint ownership of real estate or other major assets?*
22. The applicant told the Tribunal that the parties do not have enough money to purchase a house, or other major assets, with the exception of a car, which is registered and insured in the sponsor's name and was purchased in April 2016 for \$11,000. The sponsor told the

Tribunal the parties have some furniture, including a new table, which was purchased in January 2018 for \$1,600.

23. *Are there any joint liabilities?*

24. The parties provided consistent oral evidence that they have no joint liabilities.

25. *As to the extent of any pooling of financial resources, especially in relation to major financial commitments?*

26. There is no evidence before the Tribunal to demonstrate the parties pool their financial resources in relation to major financial commitments.

27. The parties have a joint account. The Tribunal has concern that there is a pattern of transactions in this account where funds are deposited and an equivalent amount is withdrawn from the account on the same or following days. The Tribunal notes that the majority of funds deposited into the joint account appear to consist of the sponsor's Centrelink payments. The applicant said the sponsor also has a bank account in his own name, which was opened prior to their marriage.

28. The applicant gave evidence she has an account in her own name, which was opened prior to the parties' relationship. She said she is the owner and sole director of 'Divine Nails', which is the small business she operates in the Manly area. She said she has a nett income from the business of \$700 per week and made an overall profit from the business in the 2017 financial year of around \$10,000, which went into her individual account.

29. The sponsor said the applicant took him to her place of business in Manly a few times after they first met, but he has not returned there since 2012. The Tribunal noted there are some cash deposits into the parties' joint account, which were made from Manly, and accepts these were likely made by the applicant.

30. *As to whether one person in the relationship owes any legal obligation in respect of the other?*

31. There is no evidence before the Tribunal to demonstrate the parties owe any legal obligation in respect of the other.

32. *As to the basis of any sharing of day to day household expenses*

33. The applicant told the Tribunal that the sponsor pays for petrol and food for their household. The sponsor gave the Tribunal consistent evidence with regard to this issue and also said the applicant pays the rent for their accommodation and meets her own personal expenses. He said he thinks the applicant has savings of around \$10,000 or \$15,000 in a bank account in her own name.

34. The Tribunal invited the applicant to comment on the pattern of transactions in the records from the joint account, which were provided with the review application, which show funds being deposited into the account and equivalent amounts being withdrawn in cash on the same or following days. The applicant acknowledged this pattern of transactions was there and said she and the sponsor share a joint bank account, from which he makes regular cash withdrawals of \$500, as he prefers to conduct most of his day to day financial transactions in cash. She said this was not unusual for Asian people, who tend to use cash wherever possible.

35.

36. *Assessment of the financial aspects of the parties' relationship*

37. The parties have no shared assets of any note, joint liabilities or legal obligations with respect to each other.
38. The Tribunal has formed the view that there is relatively limited evidence that clearly demonstrates the parties pool their finances to any significant degree for the purpose of sharing their day to day household expenses. The Tribunal accepts it is commonplace for people with the parties' cultural background to preferentially operate, where possible, in a cash economy. However, the consequence of this is that there is not convincing evidence to support their claims as to how regular household and related living expenses are met. The applicant gave evidence her landlord prefers to be paid in cash and there are no receipts to corroborate the claim she pays the rent for the parties' accommodation. The sponsor's Centrelink payments appear to be deposited into the joint account and the Tribunal accepts he withdraws funds from this account on a regular basis. However, the Tribunal cannot see how this money is subsequently spent.
39. Whilst not considering the parties were dishonest in their evidence during the hearing, the Tribunal is not persuaded the bank records and other documentary evidence clearly support a contention they pool their finances for the purpose of meeting day to day household and related living expenses.
40. After considering the overall evidence regarding the financial aspects of the parties' relationship, the Tribunal is satisfied the applicant and sponsor have some understanding of each other's financial circumstances. The Tribunal has determined it can place some, but only limited weight on a contention the parties' financial arrangements are clearly indicative of a couple in a genuine and continuing relationship.

41. **The nature of the household**

42. *Is there any joint responsibility for the care and support of children?*

43. The parties gave consistent evidence they have no joint responsibility for the care and support of children.

44. *As to the living arrangements of the persons?*

45. The applicant told the Tribunal she works six days per week as a nail technician in her nail business in Manly. She explained this requires a long trip by public transport from their rental accommodation in Bankstown and as a consequence she is away from home for a considerable part of the day.
46. The Tribunal has reviewed the documents provided with the review application and accepts the parties receive correspondence at the Allum St Bankstown address where they claim to have resided since June 2015.

47. *As to any sharing of the responsibility for housework?*

48. The applicant said the sponsor prepares their evening meals and on her day off, on Mondays, she washes their clothes and cleans their home. The sponsor gave consistent evidence in relation to this issue.

49. *Assessment of the nature of the parties' household*

50. There is no evidence before the Tribunal to suggest the parties do not reside together in rental accommodation in Bankstown. The Tribunal considers there is limited evidence overall before it in relation to this aspect of the parties' relationship. However, on balance, the Tribunal accepts the parties share a household in which the applicant performs most domestic tasks and as well works in her own business six days per week. The Tribunal is satisfied the evidence in relation to the nature of the parties' household is plausible and supportive of a contention they are in a genuine and continuing relationship.

51. **The social aspects of the relationship**

52. *As to whether the persons represent themselves to other people as being in a spousal relationship with each other?*

53. The parties gave consistent evidence they have some social contact together with the applicant's elder sister, most recently over the 2017 Christmas period, and they attended the wedding of the daughter of a friend of the applicant's sister in January 2018. The applicant said that prior to that they most recently socialised together as a couple with other people in July 2017. She said they have provided photographs of these social occasions.
54. In response to a comment from the Tribunal that the photos provided with the review application appeared to have been taken on only a few occasions and do not show the parties undertaking many joint activities or in day to day household contexts, the applicant said the sponsor's family do not support the parties' relationship and that her parents are in Vietnam. She said their landlord is aware of the parties' relationship.
55. The sponsor has declared his 'partnered' status to Centrelink.

56. *As to the opinion of the persons' friends and acquaintances about the nature of the relationship?*

57. The Tribunal has no evidence before it as to the current opinion of the parties' relatives, friends or acquaintances as to the nature of their relationship. The Tribunal has reviewed the witness support documents previously provided to the Department in 2013 and 2015, but is not satisfied they shed light on the current opinions of these people with respect to the nature of the parties' relationship.
58. The applicant told the Tribunal that she has had no contact with the sponsor's children and that he has not maintained contact with them since his marriage with his previous wife broke down and he moved to Sydney from Melbourne. She said her parents have not met the sponsor, as they have not travelled to Vietnam together, but they do have contact with her elder sister who resides in Australia.

59. *As to any basis on which the persons plan and undertake joint social activities?*

60. The applicant told the Tribunal that she and the sponsor do not go out and socialise much with other people. She said this is because she works six days per week and does not get home until after it is dark.

61. *Assessment of the social aspects of the parties' relationship*

62. The Tribunal considers the available evidence provides only limited support to the contention they are in a genuine and continuing relationship at the present time. There is no recent witness support document providing opinions about the nature of the parties' relationship

from relatives, friends or acquaintances. The photos provided with the review application appear to be taken in limited contexts and do not demonstrate the parties have undertaken many joint activities with each other. The Tribunal does consider the applicant's explanation for the limited activities the parties undertake together and with other people to be plausible, namely she works for long hours six days per week. Whilst this is a reasonable explanation it is also an explanation for why there is a lack of joint activities which the parties plan and undertake together and for the lack of supporting evidence from third parties. The Tribunal has placed some weight on the sponsor's past declaration of his 'partnered' status to Centrelink, which results on a reduction of his rate of Centrelink payments. The weight placed on this is, however, limited due to their being no current or recent indication of the basis on which Centrelink are determining the sponsor's payment rate.

63. The nature of the persons' commitment to each other

64. As to the duration of the relationship?

65. The parties have been married for five years and the Tribunal has placed weight on the claimed duration of their relationship.

66. As to the length of time during which the persons have lived together?

67. The parties claim to have cohabited for five years and the Tribunal has placed weight on this claim.

68. As to the degree of companionship and emotional support that the persons draw from each other?

69. The applicant told the Tribunal that she and the sponsor have many things in common, despite the difference in their ages. She said she is a quiet person by nature and that she and the sponsor have love and respect for each other.

70. The sponsor displayed some understanding of stressors which have impacted on the applicant in recent times, including the death of a sibling in Vietnam. He said they get on well and that he is an old man now, who wants a peaceful and supportive family life.

71. As to whether the persons see the relationship as a long term one?

72. The applicant said the parties see their relationship as long term and that they would like to have a child, but have not taken this step to date because of the visa uncertainty. The sponsor said he has heart problems and that he needs someone with him, like the applicant, so he is more than happy to be with her.

73. Assessment of the commitment aspects of the parties' relationship

74. The Tribunal has placed weight on the apparent duration of the parties' relationship and the length of time they claim to have cohabited. The Tribunal has noted the delegate's concern regarding the limited evidence to support their claim about their household arrangements and inconsistent evidence in relation to when their marriage took place. However, the Tribunal is not convinced there is sufficient evidence to demonstrate the parties have not lived together since 2013.
75. The Tribunal is satisfied the parties have provided a reasonable degree of knowledge of each other's health and wellbeing, and this demonstrates they provide each other with some companionship and emotional support.

76. The Tribunal considers the available evidence regarding the commitment aspects of the parties' relationship provides a reasonable amount of support to the contention they are in a genuine and continuing relationship at the present time.

77. *Conclusions on spouse criteria*

78. The Tribunal has concerns as to the limited evidence the parties have provided in support of their claims. However, the Tribunal is not convinced this reflects the applicant's intent to misrepresent her relationship circumstances. When considered in totality, the Tribunal has placed weight on the consistency in the parties' oral evidence during the hearing and the plausibility of the applicant's account of her overall life circumstances. This has, in the view of the Tribunal addressed the concerns raised by the delegate and can explain some of the apparent limitations with regard to the extent to which the parties undertake activities together and with other people.

79. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and her sponsor are validly married and that at the time of this decision they are in a genuine and continuing relationship, they have a mutual commitment to a shared life to the exclusion of all others and they live together, or not separately and apart, on a permanent basis.

80. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant meets cl.801.221(2)(c).

81. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

82. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).